

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HUGH F. LAPENOTIERE and DEPARTMENT OF THE ARMY,
FORT DETRICK, Frederick, MD

*Docket No. 00-67; Oral Argument Held January 17, 2001;
Issued March 6, 2001*

Appearances: *Hugh F. Lapenotiere, pro se; Miriam D. Ozur, Esq.,*
for the Director, Office of Workers' Compensation Programs.

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant has met his burden of proof in establishing that he is entitled to a schedule award for his accepted condition of reactive airways.

On April 8, 1997 appellant, then a 47-year-old microbiologist, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that he developed a pulmonary condition secondary to formaldehyde exposure. He stated that he first became aware of his pulmonary condition on March 12, 1997 and related it to his employment at that time. Appellant has continued to work. The Office of Workers' Compensation Programs accepted the claim for reactive airway disease.

On September 11, 1997 appellant filed a claim for a schedule award.¹ Accompanying his claim appellant submitted a pulmonary function test dated March 10, 1997; medical reports from Dr. Robert E. Bowen, a specialist in internal medicine and pulmonary disease, dated April 10, August 4 and September 10, 1997; and an attending physician's report prepared by Dr. Bowen dated September 15, 1997. The pulmonary function test was determined to be within normal limits. The August 4, 1997 note from Dr. Bowen indicated appellant should not be exposed to formaldehyde at any time. Dr. Bowen's medical report dated April 10, 1997 diagnosed appellant with reactive airway disease secondary to exposure from formaldehyde. He noted appellant's initial exposure to formaldehyde in 1989 and several low level exposures since that time. Dr. Bowen noted the results of pulmonary function tests appellant underwent in 1988, 1994 and 1997. In his report dated September 10, 1997, he indicated appellant could return to clerical work with minimal exposure to formaldehyde. The attending physician's report diagnosed appellant with reactive airway disease and indicated with a checkmark "yes" that appellant's

¹ Appellant submitted two CA-7 forms dated February 24 and May 12, 1998.

condition was caused or aggravated by an employment activity. Dr. Bowen noted appellant's workplace exposure to formaldehyde since 1989.

In a statement of accepted facts dated July 28, 1997, the Office noted that, in appellant's job as a microbiologist from 1989 to the present, he was daily exposed to formaldehyde. The Office noted appellant's first exposure was September 15, 1989 while he was removing boxes of supplies he experienced dermal contact exposure. Appellant was again exposed to formaldehyde through inhalation on October 9, 1990, June 15, 1994 and July 24, 1996.

In a letter dated October 20, 1997, the Office requested that Dr. Bowen determine the extent of any permanent impairment arising from appellant's accepted employment injury in accordance with the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (4th ed. 1993). By report dated December 15, 1997, Dr. Bowen determined that appellant had a 26 percent reduction in his exercise capacity as related to his pulmonary function; however, he did not explain how he calculated the impairment rating under the A.M.A., *Guides*.²

Dr. Bowen's report and case record were referred to the Office's medical adviser. In a report dated May 19, 1998, the Office medical adviser determined, using the A.M.A., *Guides*, that appellant sustained no ratable pulmonary impairment.³ The Office medical adviser noted the date of maximum medical improvement was December 15, 1997.

In a decision dated June 30, 1998, the Office determined that the pulmonary impairment was not severe enough to be considered ratable for the purposes of a schedule award.

In a letter dated July 23, 1998, appellant requested a hearing before an Office hearing representative, which was held June 15, 1999. He submitted additional factual and medical evidence in support of his claim.

In an August 4, 1999 decision, the hearing representative affirmed the decision of the Office dated June 30, 1998. The hearing representative determined that the Office medical adviser properly applied the proper edition of the A.M.A., *Guides* to the information provided in the March 10, 1997 pulmonary function test performed on behalf of Dr. Bowen and concluded that appellant sustained no ratable pulmonary impairment.

The Board finds the Office properly denied appellant's claim for a schedule award for his accepted condition of reactive airways.

Section 8107 of the Act specifies the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body. The Act, however, does not specify the manner by which the percentage of loss of a member, function or organ shall be determined. The method used in making such a determination is a matter, which

² Appellant submitted a narrative statement dated January 5, 1998 as well as various medical records documenting his lung condition.

³ See page 162, Table 8 of the A.M.A., *Guides*.

rests in the sound discretion of the Office.⁴ For consistent results and to ensure equal justice under the law to all claimants, the Office has adopted the A.M.A., *Guides*, as the standard for determining the percentage of permanent impairment, and the Board has concurred in such adoption.⁵

On appeal appellant alleges that the A.M.A., *Guides* reference a recommendation for an adjustment or correction factor for predicting lung function for those individuals with reduced lung capacity. Although this adjustment factor has not been adopted by the A.M.A., *Guides* appellant argues similar allowances should be made for individuals with larger lung capacity such as his.

The Board has considered appellant's argument and notes that the A.M.A., *Guides* have not adopted a correction factor for those individuals with reduced lung capacity. For consistent results and to ensure equal justice under the law to all claimants, the Office, as noted above, has adopted the A.M.A., *Guides*, as the standard for determining that percentage of permanent impairment, and the Board has concurred in such adoption.⁶ Therefore, even though appellant may have a larger lung capacity than the average individual, no adjustment factor can be implemented under the current standards as set forth in the A.M.A., *Guides* as this would violate the policy of uniformity and equal justice under the law as applied to all claimants.

Additionally, the Board has reviewed Dr. Bowen's medical reports dated April 10 and December 15, 1997, and May 27, 1999 which determined appellant sustained a 26 percent reduction in his exercise capacity and notes that Dr. Bowen did not adequately explain how his determination was reached in accordance with the relevant standards of the A.M.A., *Guides*.⁷ He did not cite to tables or charts to confirm his impairment rating determination.

The medical adviser who reviewed Dr. Bowen's reports as well as the pulmonary function test of March 10, 1997 correlated findings from the pulmonary function test to specific provisions in the A.M.A., *Guides*. The medical adviser specifically noted that, based on the A.M.A., *Guides*, Table 8, *Classes of Respiratory Impairment*, 4th edition page 162, the results of appellant's pulmonary tests fall within Class 1, indicating that there is no ratable pulmonary impairment. Specifically, Table 8 on page 162 of the A.M.A., *Guides* provides that, if a person falls within the following parameters, there is no ratable pulmonary impairment: forced vital capacity (FVC) of greater than or equal to 80 percent of predicted; forced expiratory volume in the first second (FEV₁) of greater or less than 80 percent of predicted; and FEV₁ divided by FVC (FEV₁/FVC) greater than or equal to 70 percent; and diffusing capacity of carbon monoxide (Dco) greater than or equal to 70 percent of predicted. Appellant's pulmonary function test performed on March 10, 1997 produced the following results: FVC of 121 percent of predicted; FEV₁ of 120 percent of predicted; FEV₁/FVC of 82 percent; and a Dco of 94 percent of

⁴ *Danniel C. Goings*, 37 ECAB 781 (1986); *Richard Beggs*, 28 ECAB 387 (1977).

⁵ *Henry L. King*, 25 ECAB 39 (1973); *August M. Buffa*, 12 ECAB 324 (1961), *Francis John Kilcoyne*, 38 ECAB 168 (1987).

⁶ *Id.*

⁷ *See Tonya R. Bell*. 43 ECAB 845, 849 (1992).

predicted. These results fall within the parameters of Class 1 the A.M.A., *Guides* and result in no ratable impairment of the whole person.⁸

The Board therefore finds that the Office medical adviser properly applied the A.M.A., *Guides* in finding that appellant had no ratable pulmonary impairment. There is no other medical evidence, in conformance with the A.M.A., *Guides*, showing that appellant has a ratable pulmonary impairment. Appellant is therefore not entitled to a schedule award as he has no ratable pulmonary impairment.

The decision of the Office of Workers' Compensation Programs dated August 4, 1999 is hereby affirmed.

Dated, Washington, DC
March 6, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁸ See page 162, Table 8 of the A.M.A., *Guides*.